ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

CARRISON (PLAINTIFF) *v.* RODRIGUES AND OTHERS (DEFENDANTS.)[*] 1886 *April* 21.

Compromise—Compromise made notwithstanding dissent of client—Counsel's powers to compromise—Consent decree set aside.

Where Counsel, after consulting with his attorney and client as to the advisability of compromising a case, and after receiving instructions from the attorney "to do the best he could for his client," compromised the case, notwithstanding the express prohibition of the client; and the client before the consent decree was drawn up notified her dissent to the other side: *Held* that the consent decree must be set aside.

THIS was an an application to set aside a compromise.

The suit, which was one for the construction of a will and for certain other relief, was, after the first day's hearing on which one issue was disposed of, and after an adjournment of two weeks, compromised, and a decree passed in accordance with such compromise, both sides being represented by counsel.

On the day following the compromise the plaintiff's attorney wrote to the Registrar of the Court desiring him not to draw up the decree, as the plaintiff dissented from the compromise, and five days later, but at a time when no decree was drawn up, direct notice was given to the defendant's attorney of the plaintiff's dissent.

The affidavit filed by the plaintiff in support of her application stated the following facts, omitting matters which are immaterial to this report:—

That on the second day's hearing, on the 11th March, the defendant's attorney suggested certain terms of settlement to plaintiff's counsel, to which terms the plaintiff declined to agree, expressing her intention to fight out the case; that on the 30th March the case appeared in the peremptory board, and was called on for hearing, when it was suggested by defendant's counsel that the learned Judge presiding might possibly assist at effecting a compromise; that the learned Judge and counsel on both sides retired to the Judge's room, and discussed certain terms of settlement;

[*] Original Civil Suit No. 391 of 1885.

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that on the termination of their consultation, the plaintiff's counsel strenuously advised the plaintiff to settle the case; that the plaintiff protested against certain of the terms, and that the plaintiff's attorney shortly after joined the consultation, and sided with his counsel in endeavouring to get the plaintiff to consent to the compromise; that the plaintiff, however, refused to consent, and that on the attorney instructing counsel "to do his best for the plaintiff," the plaintiff again explained to her counsel that she refused to compromise; that after this consultation counsel went back to the private room of the learned Judge, and, after some consultation, the learned Judge and counsel returned to Court, when a written paper was handed up to the Court, which purported to compromise the case, the plaintiff however not having seen the paper or having had it explained to her; and that an order was made in terms of the settlement put in. That subsequent to the compromise, the plaintiff, after learning the terms thereof, still expressed her unwillingness to be bound thereby; and on the day following appeared in Court, and informed the Court that she disapproved of the manner in which the case had been disposed of.

Mr. *Pugh* and Mr. *Garth* appeared for the defendants.

Mr. *Pugh*.—The attorney had power to instruct counsel as he did. The compromise cannot be set aside by this application. On the authority of attorneys to settle see *Pritswick* v. *Poley* (1), where it was held that, in the absence of a distinct prohibition from the client, he may settle. In *Fray* v. *Voules* (2), it is held that an attorney cannot compromise when expressly forbidden to do so, even if it be for the benefit of the client; but that if he does so, the compromise, although perhaps binding as between him and third parties, is *ultra vires* as between him and his client. In *Butler* v. *Knight* (3), the client expressly told the attorney not to compromise and he did so notwithstanding. On the other hand, *Strauss* v. *Francis* (4) lays down that counsel can compromise notwithstanding dissent of client unless the dissent is brought to

(1) 34 L. J. C. P., 189.
(2) 28 L. J. Q. B., 232; 1 E. and E., 839.
(3) L. R. 2 Ex., 109.
(4) L. R., 1 Q. B., 379.

notice of the opposite party at the time. In *Swinfen* v. *Swinfen* (1) it was held that counsel, if instructed by attorney, can consent to a compromise, and the Court will not inquire into the existence or extent of his authority even though the client repudiate counsel's authority to consent. In that case affidavits were made by all the counsel engaged in the case and by the plaintiff's attorney; here the lady's attorney has made no affidavit.

Holt v. *Jessse* (2) is against me as showing that a consent given by counsel in presence of the client may be withdrawn before the order is drawn up, if given through inadvertence. [TREVELYAN, J.—There the Court found that Mr. Jesse expressly consented to the order, see p. 182]. I don't suggest that the plaintiff in this case consented, but I say, she through her attorney instructed counsel to do his best in regard to a compromise.

Mrs. *Carrison* appeared in person and stated that she had never given her consent to the compromise.

TREVELYAN, J.—This is an application to set aside the decree made by consent on 30th March 1886. The facts on which I must act are contained in an affidavit made by the plaintiff and also by Mrs. Westcott, her daughter. I am bound to say at the outset that it is somewhat extraordinary, considering the terms of the affidavit, that the attorney on the record, who was perfectly cognizant of the facts alleged, did not support it. But I do not think that this circumstance, although one would have expected the attorney to come to the assistance of the Court, would justify me in refusing to act. The case came on for hearing for the second time on the 30th March 1886. On a previous occasion I had decided a particular issue, and held that the plaintiff under her husband's will was entitled to the property for life.

When the case was called on, counsel for the defendant, seeing that a continuance of the litigation would involve the disappearance of the property in suit, suggested that I might assist in a compromise. I felt that it was clearly a case which the parties ought to settle. But there was nothing to compel a settlement, and the parties were entitled to a decision if they desired it.

Counsel on both sides then came to my room and we discussed the terms of settlement, which were to a great extent

(1) 26 L. J. C. P., 97 (2) L. R. 3 Ch. D., 177.

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suggested by me, and which appeared to me to be extremely reasonable. So far as I recollect, when we had discussed the terms, counsel for the plaintiff left the room to get his client's consent, and I impressed on him the necessity of his getting her consent. Counsel came back, having explained the matter to his client, and having, as I thought, obtained her consent. Terms were put in and signed by counsel on both sides.

The next day the plaintiff's attorney wrote and repudiated the settlement. (The Court here read Mr. Lewis's letter of the 31st March to the Registrar of the Court). As I understand it, it is not disputed that this dissent was communicated the same day to the defendants. At any rate on the 5th April 1886, six days after the consent decree, express notice of this application was given to the defendants and their attorney, and at that time no decree had been drawn up. Had the decree been drawn up and sealed, it would have been impossible to deal with the case. A long affidavit has been put in; in it Mrs. Carrison says that she declined a settlement throughout, and there can be no doubt that this statement is correct. (Here followed portions of that affidavit).

Several cases have been cited to me, and I think that I must decide in favour of the plaintiff. It may be very hard on the defendants that, when a settlement was formally drawn up by both sides, the matter should be re-opened; but on the other hand, it would be hard to insist upon the plaintiff being bound by a compromise to which she was not an assenting party.

I will cite in passing the remarks of Vice-Chancellor Malins, in *Holt* v. *Jesse* (1), a case in which Jesse was actually in Court at the time of settlement.

"Now I can only say that this is an order which, if Mr. Jesse did not consent to, he ought to have consented to most cheerfully and thankfully; but I am satisfied that he did consent to it. He was present in Court and thoroughly understood it, and he is not, in my opinion, at liberty to withdraw the consent then given." (The plaintiff in the case before me swore that she never at any time consented to any settlement).

"But as much has been said in the course of the argument,

(1) L. R. 3 Ch. D., 177 (182).

and authorities have been cited about the general principles of the Court in withdrawing consents given to orders, I beg to express my opinion, which I believe is in conformity with all the cases that have been cited, that, if it shall turn out that by the inadvertence of counsel, by the careless consent of the plaintiff or defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time, such as in the case of *Swinfen* v. *Swinfen* (1), where counsel was instructed to do one thing and consented to a totally different thing; that is, for instance, being instructed to make a claim to an estate in fee simple, he consented that the claimant should have a life estate only, or a tenancy for life; that is entirely beyond his authority, and nothing could be more reasonable than that his client should not be bound by such a consent inadvertently given."

The case of *Strauss* v. *Francis* (2) cited by Mr. Pugh and much relied on is cited by Malins, V. C., in *Holt* v. *Jesse*. If the proposition of Vice-Chancellor Malins is correct, *à fortiori* the suitor is not bound here. Here there is no consent at all, but a careful dissent. It is difficult to say how it came about that counsel consented.

In the case of *Strauss* v. *Francis* (2), the principle is laid down by Blackburn, J.: "We are all agreed that there clearly ought to be no rule. The plaintiff by no means makes out that there was any express dissent on his part to withdrawing a juror; there is nothing on the affidavits to show that the client absolutely withdrew all authority, nor is there anything to show that counsel had done so unprofessional a thing as to undertake the conduct of a cause giving up all discretion as to how he should conduct it; still less is there any thing to show that there was the slightest knowledge on the part of the other side that the apparent general authority of counsel had been in fact limited."

It is true that in this case the defendants had not, at the exact moment of the decree being made, any knowledge that the

(1) 2 De. G. and J., 381; 26 L. J. C. P., 97.

(2) L. R. 1 Q. B. D., 379.

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authority of the plaintiff's counsel had been limited by the plaintiff, but they obtained this knowledge almost immediately, and before the decree was drawn up; for the plaintiff took steps the next day and wrote to the Registrar not to draw up the decree. So far as I can see the plaintiff has repudiated the consent within the time she was entitled to do so. I, therefore, think that I cannot exclude her from going on with her case.

I must allow this case to be retried.

T. A. P. *Consent decree set aside.*

Attorney for plaintiff: Mr. *G. Lewis.*

Attorney for defendant: Mr. *Fink.*